

4 E-FILED on 11/23/09

8 IN THE UNITED STATES DISTRICT COURT

9 FOR THE NORTHERN DISTRICT OF CALIFORNIA

11 JEREMIAH BIRCHETT,

12 Petitioner,

13 v.

14 BRIAN HAWS, Warden

15 Respondent.

16 No. 09-00610 RMW

17 ORDER TO SHOW CAUSE

18
19 Petitioner, a California prisoner, filed a petition for a writ of habeas corpus pursuant to 28
20 U.S.C. § 2254. The court orders respondent to show cause why a writ of habeas corpus should not
21 be granted.¹22 **I. BACKGROUND**23 Following a jury trial, petitioner was convicted of two counts of possession of cocaine base
24 for sale, Health and Safety Code section 11351.5, one count of sale of cocaine base, Health and25
26 ¹Petitioner, although represented, has filed *pro se* a motion for leave to proceed *in*
27 *forma pauperis* (Doc. No. 7); amended petition for writ of habeas corpus; (Doc. No. 9); a
28 motion for bail pending appeal and for stay of execution of judgment (Doc. No.6); and a
motion for modification of sentence (Doc. No. 5). The court has confirmed with counsel
that he still represents petitioner and that petitioner's *pro se* filings are withdrawn.

1 Safety Code section 11352, and one enhancement for a prior conviction under Penal Code section
2 662.5. On March 28, 2007, petitioner was sentenced to an aggregate term of 9 years 4 months in
3 prison. On November 12, 2008, the California Supreme Court denied review of petitioner's direct
4 appeal. The instant petition for habeas corpus was filed in this court on February 11, 2009.

5 **II. ANALYSIS**

6 **A. Standard of Review**

7 This court may entertain a petition for writ of habeas corpus "on behalf of a person in
8 custody pursuant to the judgment of a state court only on the ground that he is in custody in violation
9 of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a); *Rose v. Hodges*,
10 423 U.S. 19, 21 (1975). A district court shall "award the writ or issue an order directing the
11 respondent to show cause why the writ should not be granted, unless it appears from the application
12 that the applicant or person detained is not entitled thereto." 28 U.S.C. § 2243.

12 **B. Petitioner's Cognizable Claims**

13 As grounds for federal habeas relief petitioner raises two issues: (1) the court erred in its
14 denial of a continuance for trial so that petitioner could retain counsel of his choice after his
15 appointed counsel, John McDougall, had failed to prepare for trial and (2) counsel was ineffective in
16 its decision not to call Randi Harvey as a witness, which was induced by the prosecutor's improper
17 threat to put Ms. Harvey in prison if she testified. The court will require respondent to show cause
18 why the petition for a writ of habeas corpus should not be granted.

18 **III. ORDER**

19 Good cause appearing, the court hereby issues the following orders:

20 1. The Clerk of the Court shall serve a copy of this order and the petition (docket no. 1) and all attachments thereto upon respondent and respondent's attorney, the Attorney General of the
21 State of California. The Clerk shall also serve a copy of this order on petitioner at his current
22 address.

23 2. Respondent shall file with this court and serve upon petitioner, within ninety (90) days of the issuance of this order, an answer conforming in all respects to Rule 5 of the Rules
24 Governing Section 2254 Cases, showing cause why a writ of habeas corpus should not be issued.
25 Respondent shall file with the answer and serve on petitioner a copy of all portions of the relevant
26 state records that have been transcribed previously and that are relevant to a determination of the
27 issues presented by the petition.

1 3. If petitioner wishes to respond to the answer, he shall do so by filing a traverse with
2 the court and serving it on respondent within thirty (30) days of his receipt of the answer. Should
3 petitioner fail to do so, the petition will be deemed submitted and ready for decision thirty (30) days
4 after the date petitioner is served with respondent's answer.

5 4. Respondent may file a motion to dismiss on procedural grounds in lieu of an answer,
6 as set forth in the Advisory Committee Notes to Rule 4 of the Rules Governing Section 2254 Cases
7 within ninety (90) days of the date this order is filed. If respondent files such a motion, petitioner
8 shall file with the court and serve on respondent an opposition or statement of non-opposition to the
9 motion within thirty (30) days of receipt of the motion, and respondent shall file with the court and
serve on petitioner a reply within fifteen (15) days of receipt of any opposition.

10 5. It is petitioner's responsibility to prosecute this case. Petitioner is reminded that all
11 communications with the court must be served on respondent by mailing a true copy of the
12 document to respondent's counsel. Petitioner must keep the court and all parties informed of any
13 change of address by filing a separate paper captioned "Notice of Change of Address." He must
14 comply with the court's orders in a timely fashion. Failure to do so may result in the dismissal of
15 this action for failure to prosecute pursuant to Federal Rule of Civil Procedure 41(b)..

16 6. Extensions of time are not favored, though reasonable extensions will be granted.
17 Any motion for an extension of time must be filed no later than ten (10) days prior to the deadline
sought to be extended. IT IS SO ORDERED

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21
22 Dated: 11/23/09


RONALD M. WHYTE
United States District Judge

1 **Notice of this document has been sent to:**

2 **Counsel for Petitioner:**

3 Robert Joseph Beles pablito@lmi.net

4 **Counsel for Respondent:**

5 (No appearance)

6 Counsel are responsible for distributing copies of this document to co-counsel that have not
7 registered for e-filing under the court's CM/ECF program.

8
9 **Dated:** 11/23/09

CCL
Chambers of Judge Whyte